87-1172

Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE DOCKET NO._____

UNITED STATES SUPREME COURT

1987 TERM

HARRY BEALE

v.

C. WILLIAM O'NEILL, et al.

PETITION FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harry A. Beale, Petitioner
775 Kaderly Drive
Columbus, Ohio 43228
614/276-4100

Representing himself

29pp

A. LIST OF QUESTIONS

INTRODUCTION Beale is clearly not an attorney and his learning of the law and form is without doubt highly flawed. He therefore apologizes for his inadequacies to the learned reader who ventures further.

I. **CONSTITUTION** 1. According to Art. III., Section 1 of the Constitution of the United States, and 42 USC §1983 as amended in 1979, is there such a thing as Judicial Immunity for the Federal inferior Court Judges? Can the Supreme Court make the regulations and rules for the inferior Courts according to Art. III., Section 2. [2] of the Constitution? Is the decision of **Pierson v. Ray**, 386 U. S. 547 (1967) therefore unlawful and unconstitutional? Since Judges of the inferior Courts have authority to suspend

Acts of the Congress and expend public funds through certain judgments, are they public ministers by definition and therefore triable under Art. III., Section 2. [2] anyway?

2. Does a U. S. Citizen have a fundamental right to a fair trial and is this actually two rights juxtaposed, i.e., is there a fundamental right to a trial and a fundamental right to fairness? Is the fundamental right to fairness pervasive to the entirety of due process, including pretrial matters?

II. **JUDGES** 3. Is there a bound beyond which a Judge of an inferior Court may no further deny Constitutional rights without the allowance of collateral attack? To preserve the integrity of the Court, must counsel first formally (or in camera, as appropriate) notify the Court

of the serious denial and so allow the Court the opportunity to correct the problem in situ?

4. If a Federal Judge is shown by documentary substantiation that an earlier pretrial decision is based entirely upon perjured testimony, is that Judge constrained to act to correct the situation in the name of fairness? Can a Judge present a ruling which is merely window dressing for the appeal process and which ignores the pertinent matter in the complaint?

5. Is it the duty of a Federal Judge to determine if witnesses before the Court are proper and/or properly under oath? Does Rule 603, Federal Rules of Evidence, make the Court complicit in perjury for failure to administer a properly calculated oath?

Does Rule 610, ibid., support this position? Would problems be alleviated if the Court holds that it must consider all religions as only preference social organizations, i.e., divinity per se is beyond the jurisdiction of the Court, and therefore as social organizations, Art. VI. of the Constitution must be embraced?

6. Can a Federal Judge refuse to allow the amending of a complaint to be legally proper or sufficient merely because the amending would constitute a valid citation of a law firm for malpractice?

7. Is it an abridgment of fundamental fairness if the law clerks of a Federal Judge converse with and prompt attorneys opposing a pro se litigant, during a hearing, while the Judge is under suit?

8. If a Federal Court of Appeals finds a District Court Judge has tampered with evidence, is it denial of due process if they dismiss the case and then change the local rules to attempt to stop such from occurring again and does such involve the compounding of a felony?

9. Is it a violation of the rights of a pro se litigant according to Amendment XIV., for a Federal Judge to call a meeting of counsellors for the defendants and for the counterclaim defendants in chambers after a hearing and omit a pro se litigant?

10. Does a Federal Judge have a duty to act promptly if improper activities of attorneys are brought to his attention and what is promptly? Is enforcement mandatory if specified in the Local Rules of the Court? Can the

Federal Judge refuse to act promptly on the basis that the party bringing the notice of improper activities of attorneys to his attention is only pro se before the Court and as such is this a denial of rights according to Amendment XIV. of the Constitution, if such is not a requirement of the Local Rules?

11. As a minimum, must the salaries of Judges of the inferior Courts be greater than or equivalent to the average of the upper 1/3 of the attorneys' salaries in their respective district or circuit?

III. **ATTORNEYS** 12. Is it the duty of the inferior Federal Courts to develop the linkage at all times between truth, law, fairness and justice? Because of the latitude granted to attorneys under the provisions of advocate duty wherein

it may be in the interests of their clients to conceal the truth and prey upon the lack of knowledge of Judges and/or jurors, can attorneys be held out as officers of the Court, or should a natural dichotomy be imposed for the integrity of the Court? Can attorneys practicing in Federal Courts even be allowed to be notaries public? Can attorneys be part of the Judicial Conference, ref. 28 USC §331 ff? Must all Federal Judges resign from the Bar?

13. Is legal malpractice a simple state issue of negligence when the malpractice extends to subverting a civil action in another Federal Court in another District, or is this a Federal question as denial of the fundamental right to a fair trial?

14. Is the attorney the master

of the litigation in a Civil Action, the same as is accepted in a Criminal Action (U. S. v. Marshall 488 F. 2d 1169 (9th Cir. 1973))?

15. Does the attorney signing a pleading submitted in Federal Court bear full responsibility thereto for content and form (Rule 11, Federal Rules of Civil Procedure)?

16. Does tampering with evidence in a Federal Court by an attorney as an Officer of the Court constitute a Federal Question under 28 USC §1331, or must this be handled as a matter of fraud, (U. S. v. Tomicich, 41 F. Supp. 33)?

17. Does the backdating of pleadings and altering of Civil Docket Sheets in the Office of the Clerk of the District Court constitute a willful act

of fraud and because of the necessary use and misrepresentation of Federal facility and authority, is this a Federal Question?

18. Is the circulation of backdated pleadings and evidence subjected to tampering through the U.S. Mail a Federal Question under 28 USC §1339 if damages are caused thereby and is the use of the U.S. Mail integral to the work of an attorney practicing in Federal Courts?

19. Can attorneys for the opposition contact the customers, in various states, of a publicly held corporation, urging them to restrict or eliminate their business trade and can these same attorneys seek to aid in the establishment of a competitor to the publicly held corporation or is such merely within the sphere of advocate duty

and appropriate actions for Officers of the Court?

20. Can attorneys and a Federal Judge intimidate the accountant for a public company through a series of fraudulent rulings and improper activities, to the degree that the accountant resigns from fear.

B. **LIST OF PARTIES**

The parties to the litigation are Defendants:

C. William O'Neill, Esq. ("O'Neill")

Vorys, Sater, Seymour and Pease ("Vorys")

Richard C. Graham, Esq. ("Graham")

Isaac, Brant, Ledman & Becker ("Isaac-Brant")

Hon. Joseph P. Kinneary ("Judge

Kinneary")

Plaintiff

Dr. Harry A. Beale ("Beale")

C. 1. TABLE OF CONTENTS

LIST OF QUESTIONS	1
LIST OF PARTIES	10
TABLE OF AUTHORITIES	ii
LISTING OF ACTIONS BELOW	11
STATEMENT OF JURISDICTION	11
FORMAL PROVISIONS	13
STATEMENT OF CASES	13
I. PROLOGUE	13
A. THE LEGACY OF PRESIDENT ROOSEVELT	14
B. THE DEVIOUSNESS OF THE CONGRESS	15
C. THE TREASON OF THE SUPREME COURT	17
D. THE NOBLESSE OBLIGE OF THE SUPREME COURT	19
II. STATEMENT PROPER	23
STATE COURT ACTIONS	26
JURISDICTION BASIS	27
REASONS FOR SEEKING WRIT OF CERTIORARI	27

C. 2. TABLE OF AUTHORITIES

B. F. Gladding & Co. v. Scientific "Anglers, 248 F. 2d 483 (6th Cir. 1957)

Foman v. Davis, 371 U. S. 178 (1962)

International Shoe v. Washington, 326 U.S. 310 (1945)

Mitchell v. Forsyth, 86 Law. Ed. 2d 411 (1986)

Pierson v. Ray, 386 U.S. 547 (1967)

Pulliam v. Allen, 80 Law. Ed. 2d 565 (1984)

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)

U.S. v. Dubilier Condenser Corp., 289 U.S. 178 (1933)

U.S. v. Marshall, 488 F. 2d 1169 (9th Cir. 1973)

U.S. v. Tomicich, 41 F. Supp. 33

Federal Rules of Civil Procedure, Rule 11

Federal Rules of Evidence Rules 603 & 610

Judicial Act of 1798, 1925, 1937

Judicial Code of 1911

Local Rules : Order 81-1

The Constitution of the United States

United States Code
Title 28, §42, 331, 1331, 1339 2072
Title 42, §1983

D. LISTING OF ACTIONS BELOW

Case C-2-86-1201 (Derivative Stockholder Suit)

1. Protective Order
2. Memorandum and Order
3. Order
4. Judgment Memorandum and Order

Case C-2-86-1309 (Personal Suit)

1. Protective Order
2. Decision and Order
3. Judgment
4. Denial of Motion to Amend to Relect the Complaint

Consolidated in Appeal

Order
Denial of Petition for Rehearing in Banc
Mandate

E. STATEMENT OF JURISDICTION

This Court has jurisdiction according to the Judicial Reform Act of

13 February 1925, and the Judicial Code of 1911.

(i) The date of the first Order of the U. S. Court of Appeals for the Sixth Circuit is 14 August 1987.

(ii) A Petition for Rehearing in Banc was filed on 21 August 1987. The Petition was denied on 16 October 1987. The Mandate of that Court issued on 3 November 1987. It is to the Mandate to which this Petition for Certiorari is directed, since until the Mandate issued, nothing was official. Beale filed a Motion to Stay the Mandate on 12 November 1987 pending a filing with this Court. The Motion for Stay was denied on 30 November 1987, with no surprise. ~~On 3 December 1987, Beale filed a Motion to Enlarge the time for filing this petition to 2 January 1988,~~

~~even though the proper 60 day period does not expire until 2 January 1988, simply to eliminate nonsense arguments before they are advanced.~~

(iii.) Not applicable.

(iv.) See opening statement, this section.

F. FORMAL PROVISIONS

The appropriate formal provisions relative to this case are:

1) The preamble to The Constitution of the United States, as well as Articles III., IV., V., and VI. thereof.

2) Title 42 USC §1983, as currently amended.

The entirety of the citations is presented in the Appendix.

G. STATEMENT OF CASE

I. PROLOGUE

(A Case in Logic)

Ordinarily this Court can refuse to review a Petition for Certiorari. In this action, the Court is compelled to the review by Law, i.e., to eliminate previous unlawful actions.

Beale has wrestled with the following alleged scenarios:

A. The Legacy of President Roosevelt

1. President Roosevelt issued a feint with the plan to increase the number of Justices on the high Court, and a second feint with the plan to retire the older Judges in the system, in the Judicial Act of 1937.

2. Roosevelt titillated the ego of the Court and entrapped the Court in continuing acts of sedition in the revisions of the U. S. Code in 1940,

through the ready denials of the Constitution by this Court in its quest for power, e.g. 28 U.S.C. §2072, etc., **Textile Workers Union v. Lincoln Mills**, 353 U.S. 448 (1957), **Pierson v. Ray**, 386 U.S. 547 (1967) all of which are illegal according to Art. III., Sections 1 and 2. [2], Art. V., and Art. VI., of the Constitution.

B. The Deviousness of the Congress

1. The Congress knew itself to be too inept and too divided to fulfill its duties according to Art. III., Section 2. [2] of the Constitution.

2. The Congress exploited the failures of Roosevelt (A. 1. - 2. above) and through a fraudulent alliance, tricked the high Court into making the regulations for the inferior Federal Courts. The inferior Courts were placed

administratively under the high Court, creating in the combination an absolute conflict of interest and continuing acts of sedition, through the high Court making the regulations for the inferior Courts and enacting such into law at the default of the Congress.

3. By 1979, the Congress thought the various sets of rules developed by the high Court were adequate and so 42 USC §1983 was amended. The Court was tricked into testing the amended law on only a magistrate of a State Court in **Pulliam v. Allen**, 80 Law. Ed. 2d 565 (1984) and again on the U. S. Attorney General in **Mitchell v. Forsyth**, 86 Law. Ed. 2d 411 (1986), in each instance upholding the amended law.

4. Now comes this case, demanding on the conflict of interest and

the seditious acts.

C. The Treason of the Supreme Court

1. The high Court learned the corruption of the Circuit Courts via the Judicial Act of 1798 wherein the Congress was finally forced to reorganize the Circuit Courts.

2. With an intimate in the White House in 1909, the high Court dared to advance the Judicial Code of 1911, with its many denials of the Constitution.

3. With the original intimate as the Chief Justice, the high Court maneuvered the unconstitutional Judicial Act of 1925, utilizing the then President (whose administration was known for scandals and yet who was a close ally, geographically and tactically, of the Chief Justice).

4. The Court used its influence in the Congress to defeat President Franklin Roosevelt in 1937, when he opened a frontal attack on the unconstitutional Judicial Act of 1925.

5. The Court has helped develop the most honorable laws and regulations in the World for the inferior Courts but encourages or allows their selective enforcement in the Courts and through preplanned communication, e.g. 28 USC §42, and the Judicial Act of 1925, insidiously controls what it will allow in appeal.

6. The Court along with select groups had and may still have every intention of taking total control of the U. S. Government and if challenged, will even produce cleverly altered purportedly old documents and old

Acts of Congress supporting its position as per the teachings of the infamous Pseudo-Isidorian Decretals of 857 A.D.

7. The Congress and the President amended 42 U.S.C. §1983 in 1979, to foil the plans of the Court.

D. The Noblesse Oblige of the Supreme Court

1. The Court recognized that its excessive workload was due to the Congress somehow not properly fulfilling Art. III., Section 2. [2] of the Constitution.

2. The Court developed the concept of Petitions for Certiorari, in 1911 to circumvent the appeal requirement of the Constitution and tested the use of its best judgment to determine which appeals should be heard for several years.

3. By 1940, the high Court agreed that it indeed had satisfactory control of its workload and so it undertook the making of model regulations for the inferior Courts. To avoid distractions, it accepted the administration of the inferior Courts as well, with increased communication therebetween courtesy of 28 USC §42, etc.

4. While the high Court was unconstitutionally doing the duty of the Congress, it was agreed that the Congress would not attack the Justices for sedition according to Art. III, Section 1. of the Constitution.

5. To avoid distractions, the high Court unfortunately and unlawfully passed absolute immunity down to its administratively subordinate Judges in **Pierson v. Ray**, supra, who in turn

effectively passed it to attorneys by making malpractice suits almost impossible.

6. While the various sets of regulations and rules for the inferior Courts are for the most part exemplary, the total situation is truly a legal nightmare. Certain of the rules unfortunately appear unconstitutional. The high Court is in a conflict of interest to adjudicate over rules of its own manufacture. Similarly the high Court is in a conflict of interest to preside over this case which involves administratively subordinate personnel and current law 42 USC §1983 which the inferior Courts refused to honor as required by Art. VI., of the Constitution and which this Court has already twice upheld, noting that the law is what the

Congress makes it to be at the time and that the Constitution does not specify that Judges of the inferior Courts can only be impeached in the Congress, i.e., cannot be taken to task in the Courts.

Beale has herein assembled the same set of facts in several different ways, some of which would appear to require advanced paranoia for total support. The only other ready alternative that the Justices of the high Court are simply miserable incompetents has been summarily dismissed. Therefore the Court must use this case to rid itself of the unconstitutional activities and force order in the inferior Courts with the same high level of competence it showed in developing the model regulations for the Congress to use to

make the new regulations.

II. STATEMENT PROPER

The case involves provincialism, i.e., the beneficial exploitation of the Judicial System by those who operate the system, and the loss to sight of the lofty ideals of the Preamble of the Constitution.

On 5 June 1982, Beale and the Omnimax Corporation, a venture capital firm, entered into an Agreement. Omnimax was to earn its 49% ownership in the venture through the raising of $1,700,000.00. Subsequent the Agreement, Beale reorganized a company of which he was sole owner and Omnimax allegedly raised some $5,000,000.00. Beale has since learned allegedly that Omnimax, with the aid of various attorneys

misappropriated some $4,620,000.00 of the proceeds of two R & D tax shelters. From that time to the present, various other attorneys and several Judges of various inferior Courts have attempted to find significant improper or unlawful actions of Beale where none such exist. Consequently, to protect the original law firms, new law firms deliberately exploited malpractice. These law firms were aided by the District Court Judge who found binding agreements where no agreements lawfully exist, who found that $380,000.00 is the same as $1,700,000.00, who overturned the Federal Securities Act of 1933 as amended, who overturned U. S. v. Dubilier Condenser Corp., 289 U. S. 178 (1933) as well as B. F. Gladding & Co. v. Scientific Anglers, 248 F. 2d 483 (6th Cir. 1957) with no new intervening

law, who denied Amendment XIV of the Constitution, who denied **Foman v. Davis**, 371 U. S. 178 (1962), who denied **International Shoe v. Washington**, 326 U. S. 310 (1945), etc., etc.

Beale, not having been bred to accept improper defeat, began reading law. After expending move than reasonable effort in the original Court, Beale filed additional suits. Beale found he could prove that attorneys had unlawful access to the Office of the Clerk. Beale further found that Judges of other District Courts were no better than the original Court, i.e., rather than rule according to the law (Art. VI.of the Constitution) they improperly dismissed cases, citing **Pierson v. Ray**, supra, as demanding, and conveniently ignoring most of the material in the

Complaint. The charade that only State issues are involved was an all too obvious play to get Beale out of the Federal Court and into the State Court wherein Beale would not sue a Federal employee, i.e., the Judge. Beale subsequently found that the U. S. Court of Appeals for the 6th Circuit was no better and possibly worse. That Appeals Court also upheld **Pierson v. Ray** over 42 USC 1983, etc. This Court is well aware of the machinations of cases in that Court through Civil Action C2-87-1116 in the Federal District Court for the Southern District of Ohio, Eastern Division, since this Court was originally named in that action.

H. STATE COURT ACTIONS

Not Applicable.

I. JURISDICTION BASIS

The basis of jurisdiction in the original inferior Courts that of Federal questions, i.e., 28 USC §1331.

J. REASONS FOR SEEKING WRIT OF CERTIORARI

The first and most important reason for seeking the writ is that Beale would like to have justice for the stockholders of the corporation and for himself. The second reason is that throughout this litigation Beale has found it abhorrent that allegedly the most incorrigible criminals reside within the judicial system and are cloaked with respect of their own manufacture.

CERTIFICATE OF SERVICE

The Petitioner herewith certifies that copies of this Petition have been served this date by regular U. S. Mail, postage prepaid, in accord with Rule 28, Rules of the Supreme Court of the United States upon the following at the address indicated:
Date_____

Mr. Duke Thomas
Vorys, Sater, Seymour & Pease
52 East Gay Street
Columbus, Ohio 43215

Mr. James E. Rattan
Assistant U. S. Attorney
Room 200, U. S. Courthouse
85 Marconi Boulevard
Columbus, Ohio 43215

Mr. John M. Alton
Lane, Alton & Horst
155 East Broad Street
Columbus, Ohio 43215

_____
Harry A. Beale, Petitioner
775 Kaderly Drive
Columbus, Ohio 43228
614/276-4100

Representing himself

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-1172 (2)

Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE DOCKET NO._____

UNITED STATES SUPREME COURT

1987 TERM

HARRY BEALE

v.

C. WILLIAM O'NEILL, et al.

APPENDIX TO PETITION FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harry A. Beale, Petitioner
775 Kaderly Drive
Columbus, Ohio 43228
614/276-4100

Representing himself

Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

58 pp

TABLE OF CONTENTS

Entry

Case C-2-86-1201 (Derivative Stockholder Suit)

1. Protective Order 1
2. Memorandum and Order 5
3. Order 11
4. Judgment, Memorandum and Order 14

Case C-2-86-1309 (Personal Suit)

1. Protective Order 24
2. Decision and Order 27
3. Judgment 33
4. Denial of Motion to Amend to Reflect the Complaint 34

Consolidated in Appeal

1. Order 36
2. Denial of Petition for Rehearing in Banc 42
3. Mandate 44

Title 42 USC §1983 50
Local Rules, Order 81-1 52
Verification 55
Certificate of Service

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE, FILED 1-5-87

Plaintiff

vs. Civil Action C-2-86-1201

C. WILLIAM O'NEILL, et al.,

Defendants

ORDER

This matter is before the Magistrate on the motion of defendant Joseph P. Kinneary for a protective order. Plaintiff has filed a memorandum contra the motion.

This defendant has filed a motion to dismiss the action as to him on the ground that he, as a federal judge, enjoys absolute immunity from liability

in this action. See Stump v. Sparkman, 435 U.S. 349, 355-57 (1978); Pierson v. Ray, 386 U.S. 547 (1966). This defendant now seeks a stay of discovery as to him pending resolution of this potentially dispositive motion.

Rule 26 (c) of the Federal Rules of Civil Procedure confers upon the Court a very broad discretion to manage the discovery process. See Seattle Times Co. v. Rhinehart, 104 Supp. Ct. 2199 (1984). Where the discovery sought promises to be both extensive and time-consuming, a stay of discovery pending resolution of potentially dispositive motion may be appropriate. See, e.g., Brennan v. Local U. No. 639 etc., 494 F.2d 1092 (D.C. Cir. 1974); E.E.O.C. v. Hickey-Mitchell Co., 372 F.Supp. 1117 (E.D. Mo. 1976). See also 4 Moore's Federal Practice 26.70[2]

(2d Ed. 1983).

Having carefully considered the motion and the memoranda of the parties, I conclude that a stay of discovery as to defendant Joseph P. Kinneary pending resolution of the motion to dismiss reasonably accommodates the interests of the parties to this action and is therefore appropriate.

The December 29, 1986 motion for a protective order is therefore GRANTED. Further discovery of defendant Joseph P. Kinneary is STAYED pending resolution of this defendant's motion to dismiss.

If any party seeks reconsideration of this Order, that party may, within ten (10) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Order, and

the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b) (1); Rule 72 (a), F.R. Civ. Pro.; Eastern Division Order 85-4 (I) (C) (2).

Norah McCann King
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHER DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE, : FILED 1-16-87

Plaintiff :

vs. : Case C-2-86-1201

C. WILLIAM O'NEILL, ESQ., ET AL., :

Defendant. :

MEMORANDUM AND ORDER

Plaintiff brings this action against numerous defendants alleging that they have taken improper actions and violated his constitutional rights. This matter is presently before the Court on the motion of defendant United States District Judge Joseph P. Kinneary to dismiss on the ground of judicial immunity.

In the complaint, plaintiff makes

the following allegation against Judge Kinneary:

> Kinneary is sued herein for conspiracy with Graham and/or in combination with failure to do his duty through misuse of his position and authority as Federal District Court Judge to deprive Beale and ACI [Applied Coatings International, Inc.] of their rights under the Constitution of the United States and to attempt to improperly force ACI into bankruptcy, i.e., matters not directly related to the verdict of the Court, which is material suitable only for appeal to a higher court.

In essence, plaintiff attacks the actions on inactions of Judge Kinneary in the course of performing his duties as judge in Applied Coatings v. Omnivax, Case No. C-2-84-1979.

It is established law that judges are absolutely immune from suit for

actions taken in their judicial capacity unless they are done in the clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 355-5(1978). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" Id. at 356-57; see also Dennis v. Sparks, 449 U.S. 24, 27 (1980). The rationale for judicial immunity was set forth in Pierson v. Ray, 386 U.S. 547, 554 (1967):

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His error may be corrected on appeal, but he should not have to fear that unsatisfied litigants may

> hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Plaintiff's reliance on Pulliam v. Allen, 466 U.S. 522 (1984) in support of his position that Judge Kinneary is a proper party to this action is misplaced. Pulliam was an action brought under 42 U.S.C. § 1983 in which plaintiffs alleged that a state magistrate, acting under color of state law, had an unconstitutional practice of imposing bail on persons arrested for non-jailable offenses under state law and incarcerating those persons if they could not meet bail. The District Court agreed and enjoined the practice as well as awarding costs and attorneys fees under 42 U.S.C. §1988. The Fourth Circuit

affirmed the decision, as did the United States Supreme Court. The Court stated:

> ...Congress intended §1983 to be an independent protection for federal rights and [we] find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review. We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.

Id. at 542. The Court further held that it was Congress' intent in enacting section 1988 to make attorneys fees available even when damages would be barred or limited. Id. at 543-44.

The present action is not one under 42 U.S.C. §1983 but is essentially one seeking damages from a federal judge based on alleged conduct of the judge in

his handling of a lawsuit involving the plaintiff. Although plaintiff may claim errors on the part of the judge by way of an appeal, plaintiff may not circumvent the appeal process by way of this collateral action. Pierson, 586 U.S. at 554.

The Court therefore finds the motion to dismiss of defendant District Judge Joseph P. Kinneary well-taken. It is therefore GRANTED and the case as against this defendant is DISMISSED in its entirety.

IT IS SO ORDERED.

John D. Holschuh, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE,	:	FILED 1-16-87
Plaintiff	:	
vs.	:	Case C-2-86-1201
C. WILLIAM O'NEILL, ESQ., ET AL.,	:	
Defendants	:	

ORDER

This matter is before the Court on the documents of plaintiff Beale entitled "Motion of Plaintiff Harry Beale for Judgment by Default," "Motion of Plaintiff Harry Beale for Determination of Competency of Defendant Kinneary," and "Motion of Plaintiff Harry Beale for consideration by the Court of the Order of the United States Magistrate in this Action, Filed 5 January 1987 and/or

Reconsideration of the Motion of Defendant Kinneary for a Protective Order."

In regard to the first motion, defendants Vorys, Sater, Seymour and Pease and C. William O'Neill were granted an extension of time up to and including December 30, 1986 in which to file a response. Defendants filed a motion to dismiss on December 30, 1986. The motion for judgment by default is therefore not well-taken and it is DENIED.

In regard to the second motion, there is absolutely no basis in fact or law to support it. It is therefore summarily DENIED.

In regard to the third motion,

the Court has reviewed the Order of the Magistrate and does not find it erroneous or contrary to law. The motion for consideration and/or reconsideration is therefore DENIED.

IT IS SO ORDERED.

_____

John D. Holschuh, Judge
United States District Court

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

HARRY BEALE **JUDGMENT IN A CIVIL CASE**

V. FILED 2-13-87

C. WILLIAM O'NEILL, ESQ.

et al CASE NUMBER: C2-86-1201
JUDGE JOHN D. HOLSCHUH

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDER AND ADJUDGED that this action is DISMISSED.

2-13, 1987
Date

KENNETH J. MURPHY
CLERK

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHER DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE, : FILED 2-13-87

Plaintiff, :

vs. : Case C-2-86-1201

C. WILLIAM O'NEILL, ESQ., ET AL., :

Defendants :

MEMORANDUM AND ORDER

Plaintiff brings this pro se action alleging that defendants have taken improper actions which have damaged Applied Coatings International, Inc. (ACI), a company of which he is a stockholder. This matter is presently before the Court on the motion to dismiss of defendants C. William O'Neill and Vorys, Sater, Seymour and Pease.

I. STATEMENT OF FACTS

Plaintiff has brought this action

pro se claiming to represent the interests of ACI. The defendants are two attorneys, C. William O'Neill (O'Neill) and Richard C. Graham (Graham), and two law firms, Vorys, Sater, Seymour and Pease (Vorys, Sater) and Isaac, Brant, Ledman Becker (Isaac, Brant). Initially, the Honorable Joseph P. Kinneary, Judge of the United States District Court for the Southern District of Ohio, was also a defendant; however, this Court dismissed the action against Judge Kinneary on January 16, 1987 on the ground of judicial immunity.

The essence of plaintiff's complaint is that ACI has received unfavorable judicial determinations in Case No. C-2-84-1979, **Applied Coatings International, Inc. v. Omnivax, Inc.**, a case still pending in this Court before

Judge Kinneary, due to the improper actions of defendants. In Count 1,plaintiff alleges malpractice on the part of O'Neill and Vorys, Sater. Count 2 related solely to Judge Kinneary and has therefore been dismissed. In Count 3, plaintiff alleges that Graham exerted improper influence over Judge Kinneary and Isaac, Brant was aware of Graham's actions. In Count 4, plaintiff alleges that a "synergetic phenomena" has developed through the improper actions of the defendants.[1]

---

1 Plaintiff has moved to supplement his amended complaint for the purpose of adding several hundred pages of documents as exhibits. It therefore has no bearing on the present motion which is limited to the allegations stated in the complaint.

Plaintiff demands damages on behalf of ACI and his costs for maintaining this action.

III. LEGAL ANALYSIS

Defendants O'Neill and Vorys, Sater have raised four arguments in support of their motion; failure of proper service, lack of subject matter jurisdiction, improper collateral attack, and failure to properly plead a derivative action. Because the Court finds that it lacks subject matter jurisdiction over the present dispute, it is only necessary to consider this argument.

District courts are courts of limited jurisdiction. Consequently, the party seeking to invoke the jurisdiction of the federal courts bears the burden of establishing that such jurisdiction

exists. Thomson v. Gaskill, 315 U.S. 442, 446 (1941).

In his statement on jurisdiction plaintiff alleged that Judge Kinneary had violated plaintiff's constitutional rights. In regard to the remaining defendants, plaintiff argued that the Court had the duty to monitor the conduct of the members of its bar. There is no allegation that the conduct of these defendants raised a federal question. Indeed, in his response to defendants' motion to dismiss, plaintiff stated:

> All the presented arguments relative to jurisdiction are specious. Jurisdiction of this Court over matters involving activities of attorneys in Federal District Court were amply presented with ruling citations in the complaint, since Beale anticipated arguments upon the point.

Construing the complaint most favorably to plaintiff, Counts 1, 3 and 4 are state claims for malpractice with no independent basis for invoking federal jurisdiction.[2] As stated earlier, Count 2 which presented the only arguable issue of a federal question, has been dismissed. In that the Court has dismissed plaintiff's federal claim, this Court has the authority to consider these state claims only if it decides to exercise its power of pendent jurisdiction. "It has consistently been

---

2 Alternatively, the claims can be viewed as a collateral attack on decisions rendered in Case No. C-2-84-1979 presently pending before Judge Kinneary in the Federal District Court for the Southern District of Ohio. As stated in this Court's Order of January 16, 1987, however, plaintiff's proper recourse in that case is by way of appeal.

recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). The Sixth Circuit has adopted the position that "district courts have minimal discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial." Province v. Cleveland Press Publishing Co., 787 F. 2d 1047, 1055 (6th Cir. 1986); Service, Hospital, Nursing Home and Public Employees Union v. Commercial Property Services, 755 F. 2d 499, 506 n. 9 (6th Cir. 1985).

The Court declines to exercise its power of pendent jurisdiction and defendants O'Neill and Vorys, Sater's motion to dismiss is therefore GRANTED.

Additionally, although there is no motion to dismiss presently pending by defendants Graham and Isaac, Brant, the allegations against these defendants also are state claims of malpractice, and the Court therefore has the duty to raise the defect in subject matter jurisdiction on its own initiative. In re Martinez, 721 F. 2d 262, 264 (9th Cir. 1983); Manway Construction v. Housing Authority of city of hartford, 711 F. 2d 501, 503 (2d Cir. 1983); Fed. R. Civ. P 12(h) (3). The plaintiff has had an opportunity to be heard as to why this Court has jurisdiction over these claims and the Court has found them to rest solely in state law. The Court declines to exercise its power of pendent jurisdiction over these claims as well

and this case is therefore DISMISSED in its entirety.

IT IS SO ORDERED.

_____

John D. Holschuh, Judge
United States District
Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE — FILED 1-5-87

Plaintiff

vs. — Civil Action C-2-86-1309

C. WILLIAM O'NEILL, ESQ., et al.

Defendants

ORDER

Defendant's December 29, 1986 motion for a protective order is GRANTED.

Defendant Joseph P. Kinneary, United States District Judge, has filed a December 17, 1986 motion to dismiss based on judicial immunity. Defendant moves to delay his deposition until after the Court has an opportunity to rule on his motion to dismiss.

Judicial immunity is immunity from suit. Its purpose is to protect judicial officers from the vexations and expense of defending his judicial actions so that he is "free to act on his own convictions, without apprehension of personal consequences to himself. "Bradley v. Fisher, 13 Wal. 335, 347 (1872). The issue of whether a defendant is entitled to immunity must be resolved before there are any proceedings on the merits of a case. Mitchell v. Forsyth, 53 U.S.L.W. 4798, 4802 (U.S. S.Ct. June 19, 1985). Until this question is decided, discovery should not be allowed. Harlow v. Fitzgerald, 457 U.S. 800, 817-818 (1982).

Under the provisions of 28 U.S.C. §636(b) (1) (A), Rule 72(a), Fed. R. Civ. P. and Eastern Division Order No. 85-4,

pt. I,C. 2, either party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. The motion must specifically designate the order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous of contrary to law.

_____

United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Harry Beale, FILED 1-26-87

Plaintiff,

vs. Case No. C-2-86-1309
JUDGE GRAHAM

C. William O'Neill, Esq., et al.,

Defendants.

DECISION AND ORDER

Pending before the court is the motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted filed by defendant, United States District Judge Joseph P. Kinneary. The motion to dismiss is based upon the theory that suit is barred by the doctrine of judicial immunity.

The United States Supreme Court long ago adopted the common law rule that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction or are alleged to have been done maliciously or corruptly. Bradley v. Fisher, 13 Wall. 335, 351 (1872).

A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors, or if he acted maliciously or in excess of his authority. Stump v. Sparkman, 435 U.S. 349 (1978). A judge is only liable if he acted in clear absence of all jurisdiction. Id., 356-357.

The policy behind the doctrine of

judicial immunity was discussed by the Supreme Court in Pierson v. Ray, 386 U.S. 547, 554 (1967), as follows:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal,but he should not have to fear that unsatisfied litigants may hound him with litigants charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Judicial immunity applies both to judicial action and inaction. Carter v. Duggan, 455 F.2d 1156 (5th Cir. 1972); Littletohn v. Fisher, 530 F.2d 691 (6th Cir. 1976).

An examination of the complaint in the instant case reveals that the acts complained of arose in connection with a

civil action over which defendant Judge Kinneary was presiding. (Complaint, Paragraph 21). The legal ruling alleged to be erroneous were made by Judge Kinneary in the exercise of his judicial jurisdiction in that case. The refusal of Judge Kinneary to initiate disciplinary action against the attorneys involved in that lawsuit was likewise a decision within his discretion and judicial province.

The recent decision in Pulliam v. Allen, 466 U.S. 522 (1984) does not alter the applicability of judicial immunity in this case. Pulliam involved a civil rights action under 42 U.S.C. Section 1983 wherein the plaintiffs were seeking prospective injunctive relief. The present suit is not one under Section 1983, and plaintiff seeks money damages,

not injunctive relief.

The claims in the instant complaint relate exclusively to alleged acts of Judge Kinneary within the scope of his jurisdiction as a United States District Judge. Therefore, the instant action is barred by the doctrine of judicial immunity, and the complaint as to Judge Kinneary fails to state a claim for which relief may be granted. The motion to dismiss Judge Kinneary as a party defendant is hereby sustained.

Plaintiff's motion for default judgment is hereby overruled.

The remaining claims in the complaint are state claims with no independent basis for invoking federal jurisdiction. In the absence of a substantial federal claim related to asserted state claims in such a way that the entire action may

properly be deemed one case, federal courts do not have jurisdiction over purely state claims. Gibson v. First Federal Savings & Loan Assoc., 504 F.2d 826 (6th Cir. 1974); United Mine Workers v. Gibbs, 383 U.S. 715 (1966). A dismissal of all federal claims before trial requires dismissal of the state claims as well. Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977) cert. denied 434 U.S. 972; Gibson v. First Federal Savings & Loan Assoc., supra at 830-831.

Whereupon, the motion to dismiss the claims against Judge Kinneary is hereby granted. The court lacks subject matter jurisdiction over the remaining claims and they are therefore dismissed. The case is hereby dismissed in its entirety.

JAMES L. GRAHAM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN A CIVIL CASE

Harry Beale FILED 2-6-87

v.

C. William O'Neill, Esq. et al.

Case Number: C-2-86-1309

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED this action is **DISMISSED.**

2-6-87
Date

KENNETH J. MURPHY
Clerk

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Harry Beale, FILED 2-13-87

Plaintiff,

vs. Case No. C-2-86-1309
JUDGE GRAHAM

C. William O'Neill, Esq. et al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiff has filed a motion to reconsider this court's judgment dismissing the instant case. Plaintiff requests reconsideration under Rule 52(b), Fed. R. Civ. P. That rule is inapplicable to the instant case. This court will consider plaintiff's motion as one to alter or amend the judgment under Rule 59, Fed. R. Civ. P. Having duly

considered plaintiff's motion, the court finds that said motion is not well taken, and plaintiff's motion to reconsider is hereby **OVERRULED.**

It is so ORDERED.

JAMES L. GRAHAM
United States District Judge

No. 87-3152
No. 87-3170

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARRY BEALE, FILED 8-14-87

Plaintiff-Appellant,

v. ORDER
C. WILLIAM O'NEILL;
VORYS,SATER,SEYMOUR AND PEASE;
RICHARD C. GRAHAM;
ISAAC, BRANT, LEDMAN AND BECKER;
JOSEPH P. KINNEARY, JUDGE,

Defendants-Appellees.

BEFORE: LIVELY, Chief Judge; MILBURN and RYAN, Circuit Judges.

These cases have been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and records, this panel agrees unanimously that oral argument is not needed. Rule 34 (a), Federal Rules of Appellate Procedure.

Plaintiff, president of and stockholder in Applied Coatings International, Inc., has moved for a stay of a district court's order of garnishment which was entered to satisfy a judgment of $100,000.00 against Applied Coatings International, Inc. Defendants O'Neill and Vorys, Sater, Seymour and Pease have moved for assessment of cost against plaintiff pursuant to Fed. R. App. P. 38.

This court lacks jurisdiction to entertain plaintiff's motion for a stay. The orders of garnishment which plaintiff seeks to stay resulted from district court Case No. 84-1979, Applied Coatings International, Inc. v. Omnimax, Inc. That case resulted in a default judgment against Applied Coatings in the amount of $100,000.00. Because plaintiff did not

appeal the judgment which resulted in the garnishment orders, this court lacks jurisdiction to stay the garnishment orders. See Fed. R. App. P. 8(a); Frisch's Restaurant, Inc. v. Shoneys, Inc., 759 F.2d 1261 (6th Cir. 1985). Accordingly, the stay must be denied.

The appeals over which this court has jurisdiction originated in two complaints filed by plaintiff in an individual capacity, and in his capacity of representing the stockholders in Applied Coatings International, Inc. in a stockholders derivative suit. Plaintiff alleged that Judge Kinneary, who rendered the default judgment against Applied Coatings International, Inc., and defendant Graham, the attorney who represented Omnimax in Case No. 84-1979, conspired to deprive him of his

constitutional rights. He further alleged that defendant O'Neill had represented Applied Coatings International, Inc. in Case No. 84-1979 and his representation therein constituted legal malpractice. The district court dismissed both actions.

With respect to the district court's orders dismissing the actions under review in Case Nos. 87-3152 and 87-3170, we conclude that the district court disposed of these cases. Clearly, Judge Kinneary was cloaked with immunity. Stump v. Sparkman, 435 U.S. 349 (1978). Plaintiff's claims against defendants O'Neill and the Vorys firm were claims of legal malpractice which did not present a federal question. The claims against defendants Graham and the Isaac firm as attorneys for Omnimax sounded in

conspiracy with Judge Kinneary, and even the most liberal construction results in the conclusion that plaintiff failed to state a claim against those defendants. Mere conclusory allegations are not sufficient to state a claim for damages based on an alleged conspiracy. Smith v. Rose, 760 F.2d 102, 106 (6th Cir. 1985). The claims against all of the defendants are properly construed as plaintiff's attempt to collaterally attack the judgment in Case No. 84-1979. The proper procedure to secure review of that judgment would have been to take a direct appeal.

The motions for a stay and for assessment of costs are hereby denied, the motion to dispense with oral argument

is hereby granted, and the judgments of the district court are hereby affirmed. Rule 9(b)(5)1, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____
Clerk

NO. 76-3152/70
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARRY BEALE, FILED 10-16-87	)
	)
Plaintiff-Appellant,	)
	)
v.	) ORDER
	)
C. WILLIAM O'NEILL ET AL.,	)
	)
Defendants-Appellees	)

BEFORE: LIVELY, Chief Judge, MILBURN and RYAN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

John P. Hehman, Clerk

No. 87-3152
No. 87-3170

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARRY BEALE,	)	MANDATE
	)	ISSUED
Plaintiff-Appellant,	)	
	)	11-3-87
v.	)	
	)	
C. WILLIAM O'NEILL;	)	
VORYS,SATER,SEYMOUR & PEASE;	)	
RICHARD C. GRAHAM;	)	
ISAAC,BRANT,LEDMAN & BECKER;	)	
JOSEPH P. KINNEARY, JUDGE,	)	
	)	
Defendants-Appellees.	)	

BEFORE: LIVELY, Chief Judge; MILBURN and RYAN, Circuit Judges.

These cases have been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and records, this panel agrees unanimously that oral argument is not needed. Rule 34 (a),

Federal Rules of Appellate Procedure.

Plaintiff, president of and stockholder in Applied Coatings International, Inc., has moved for a stay of a district court's order of garnishment which was entered to satisfy a judgment of $100,000.00 against Applied Coatings International, Inc. Defendants O'Neill and Vorys, Sater, Seymour and Pease have moved for assessment of costs against plaintiff pursuant to Fed. R. App P. 38.

This court lacks jurisdiction to entertain plaintiff's motion for a stay. The order of garnishment which plaintiff seeks to stay resulted from district court Case No. 84-1979, Applied Coatings International, Inc. v. Omnimax, Inc. That case resulted in a default judgment against Applied Coatings in the amount of

$100,000.00. Because plaintiff did not appeal the judgment which resulted in the garnishment orders, this court lacks jurisdiction to stay the garnishment orders. See Fed. R. App. P. 8(a); Frisch's Restaurant, Inc. v. Shoneys, Inc. 759 F.2d 1261 (6th Cir. 1985). Accordingly, the stay must be denied.

The appeals over which this court has jurisdiction originated in two complaints filed by plaintiff in an individual capacity, and in his capacity of representing the stockholders in Applied Coatings International, Inc. in a stockholders derivative suit. Plaintiff alleged that Judge Kinneary, who rendered the default judgment against Applied Coatings International, Inc., and defendant Graham, the attorney who represented Omnimax in Case No. 84-1979,

conspired to deprive him of his constitutional rights. He further alleged that defendant O'Neill had represented Applied Coatings International, Inc. in Case No. 84-1979 and his representation therein constituted legal malpractice. The district court dismissed both actions.

With respect to the district court's orders dismissing the actions under review in Case Nos. 87-3152 and 87-3170, we conclude that the district court correctly disposed of these cases. Clearly, Judge Kinneary was cloaked with immunity. Stump v. Sparkman, 435 U.S. 349 (1978). Plaintiff's claims against defendants O'Neill and the Vorys firm were claims of legal malpractice which did not present a federal question. The claims against defendants Graham and the

Isaac firm as attorneys for Omnimax sounded in conspiracy with Judge Kinneary, and even the most liberal construction results in the conclusion that plaintiff failed to state a claim against those defendants. Mere conclusory allegations are not sufficient to state a claim for damages based on an alleged conspiracy. Smith v. Rose, 760 F.2d 102, 106 (6th Cir. 1985). The claims against all of the defendants are properly construed as plaintiff's attempt to collaterally attack the judgment in Case No. 84-1979. The proper procedure to secure review of that judgment would have been to take a direct appeal.

The motions for a stay and for assessment of costs are hereby denied, the motion to dispense with oral argument is hereby granted, and the judgments of

the district court are hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____

Clerk

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule V1, ORDER 81-1,
LOCAL RULES OF THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

DISCIPLINARY PROCEEDINGS.

A. When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before this Court shall come to the attention of a Judge of this Court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these Rules, the Judge shall refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

B. Should counsel conclude after investigation and review that a formal

disciplinary proceeding should not be initiated against the respondent-attorney because sufficient evidence is not present, or because there is pending another proceeding against the respondent-attorney, the disposition of which in the judgment of the counsel should be awaited before further action by this court is considered or for any other valid reason, counsel shall file with the court a recommendation for disposition of the matter, whether by dismissal, admonition, deferral, or otherwise setting forth the reasons therefor.

C. To initiate formal disciplinary proceedings, counsel shall obtain an order of this Court upon a showing of probable cause requiring the respondent-attorney to show cause within 30 days

after service of that order upon that attorney, personally or by mail, why the attorney should not be disciplined.

D. Upon the respondent-attorneys's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation this Court shall set the matter for prompt hearing before one or more Judges of this Court, provided however, that if the disciplinary proceeding is predicated upon the complaint of a Judge of this Court the hearing shall be conducted before a panel of three other Judges of this Court appointed by the Chief Judge, or, if there are less than three Judges eligible to serve or the Chief Judge is the complainant, by the Chief Judge of the Court of Appeals for this Circuit.

VERIFICATION

State of Ohio:

County of Franklin:

The undersigned, being duly sworn, hereby saith that the above statements in the petition are true, except those made on information and belief, and as to those, he verily believes them to be true.

Harry A. Beale

Harry A. Beale, Plaintiff

Sworn to and subscribed before me a notary public in and for the above county and state this 6 day of Jan, 1988 ~~1987~~.

Notary Public

my comm exp: Jan 9, 1989

CERTIFICATE OF SERVICE

The Petitioner herewith certifies that copies of this Appendix have been served this date by regular U.S. Mail, postage prepaid, in accord with Rule 28, Rules of the Supreme Court of the United States upon the following at the address indicated: Date_____

Mr. Duke Thomas
Vorys, Sater, Seymour & Pease
52 East Gay Street
Columbus, Ohio 43215

Mr. James E. Rattan
Assistant U.S. Attorney
Room 200, U.S. Courthouse
85 Marconi Boulevard
Columbus, Ohio 43215

Mr. John M. Alton
Lane, Alton & Horst
155 East Broad Street
Columbus, Ohio 43215

_____

Harry A. Beale, Petitioner
775 Kaderly Drive
Columbus, Ohio 43228
614/276-4100
Representing himself

(3)

No. 87-1172

Supreme Court, U.S.
FILED
FEB 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

1987 TERM

HARRY BEALE

v.

C. WILLIAM O'NEILL, *et al.*

On Petition for Certiorari from the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS C. WILLIAM O'NEILL AND VORYS, SATER, SEYMOUR AND PEASE IN OPPOSITION TO THE PETITION FOR CERTIORARI

Of Counsel:

SUZANNE K. RICHARDS
ROBERT S. GEBHARD
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
Post Office Box 1008
Columbus, Ohio
43216-1008
(614) 464-6400

DUKE W. THOMAS
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
Post Office Box 1008
Columbus, Ohio
43216-1008
(614) 464-6263

Attorneys for Respondents,
C. WILLIAM O'NEILL AND VORYS, SATER, SEYMOUR AND PEASE

19 PP

TABLE OF CONTENTS

		Page
I.	Questions Presented for Review	1
II.	Statement of the Case	2
	A. Proceedings Below	2
	B. Statement of Facts	4
III.	Summary of Argument	8
IV.	Argument	9
V.	Conclusion	13

TABLE OF AUTHORITIES

Page

Cases

Aldinger v. Howard, 427 U.S. 1, 96 S.Ct. 2413, (1976) 11

Applied Coatings International, Inc., et al. v. Omnimax, et al., Civil Action No. C-2-84-1979, Southern District of Ohio, Eastern Division . 5,7,8,9

Gibson v. First Federal Savings and Loan Association, 504 F.2d 826 (6th Cir. 1974) 10

Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977), *cert. den.,* 434 U.S. 972 (1977), *reh. den.,* 434 U.S. 1089 (1980) 10

Lones v. Detroit, T. & I.R. Co., 398 F.2d 914 (6th Cir. 1968), *cert. den.,* 313 U.S. 1063 (1969) 10

Province v. Cleveland Press Publishing Co., 787 F.2d 1047 (6th Cir. 1986) 11

Service, Hospital, Nursing Home and Public Employees Union v. Commerical Property Services, 755 F.2d 499 (6th Cir. 1985), *cert. den.,* 474 U.S. 850, (1985) 11

Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099 (1978) 10

United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966) 10

TABLE OF AUTHORITIES—Continued

Page

Statutes and Rules:

28 U.S.C. §1331 5,11

28 U.S.C. §1332 8,9

Supreme Court Rule 17 8,11

Supreme Court Rule 21 12

[This Page Intentionally Left Blank]

I. QUESTION PRESENTED FOR REVIEW

1. Whether the Supreme Court should grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit dismissing appellant-petitioner's consolidated appeals for lack of subject matter jurisdiction.

II. STATEMENT OF THE CASE

Because respondents C. William O'Neill ("O'Neill") and Vorys, Sater, Seymour and Pease ("Vorys") believe that the Statement of the Case presented in the Petition for Certiorari is not a clear or complete statement of the nature of the proceedings below and the jurisdictional facts reflected in the record below, respondents deem it necessary to set forth this separate Statement of the Case.

A. Proceedings Below

The Petition for Certiorari, which is before this Court from the United States Court of Appeals for the Sixth Circuit, seeks a review of the Sixth Circuit's denial of two consolidated appeals brought by appellant-petitioner Harry Beale ("Petitioner") against respondents C. William O'Neill ("O'Neill") and the law firm of Vorys, Sater, Seymour and Pease ("Vorys"), and the Honorable Joseph P. Kinneary ("Judge Kinneary"), Richard C. Graham ("Graham") and the law firm of Isaac, Brant, Ledman and Becker ("Isaac"). The Sixth Circuit denied the appeals on August 14, 1987, after concluding that the United States District Court for Southern District of Ohio, Eastern Division, had properly dismissed the actions for lack of subject matter jurisdiction. Petitioner then filed this Petition for Certiorari on January 4, 1988, after the Sixth Circuit denied his Motion for Rehearing En Banc on October 16, 1987.

In the consolidated appeals, Petitioner contested the dismissals of *pro se* actions commenced in the District Court on October 7, 1986 (Case No. C-2-86-1201) and on October 20, 1986 (Case No. C-2-86-1309).[1] The actions

[1]The actions were consolidated on appeal by the Sixth Circuit on March 27, 1987, under appeal numbers 87-3152 and 3170.

were identical in terms of the named defendants and counts alleged, except that the first action was brought as a shareholder derivative suit on behalf of Applied Coatings International Delaware ("ACI-Delaware"), and the second action was brought on behalf of Petitioner solely in his individual capacity. In both actions, the counts against respondents O'Neill and Vorys alleged malpractice claims originating from their representation of Petitioner and ACI-Delaware in a prior lawsuit (Case No. C-2-84-1979). O'Neill and Vorys had been permitted to withdraw as counsel in Case No. C-2-84-1979 by order of the District Court on October 25, 1985. The counts against Graham and Isaac alleged "improper influence" in their representation of the opposing party to the lawsuit. As to Judge Kinneary, the counts alleged prejudicial misconduct in ruling against the Petitioner and ACI-Delaware in two preliminary injunction hearings pending in the lawsuit.

On December 30, 1986 O'Neill and Vorys filed dismissal motions in both actions. The other defendants also filed dismissal motions in the actions. The motions were premised upon several grounds, including the lack of subject matter jurisdiction. Thereafter, all counts against Judge Kinneary were dismissed on the grounds of judicial immunity. The District Court entered dispositive judgments as to respondents O'Neill and Vorys and all other named parties on February 6, 1987 and February 13, 1987, dismissing the actions in their entirety for lack of subject matter jurisdiction. In each Memorandum and Order entered, the District Court cited the lack of federal claims and absence of diversity of citizenship among the named parties as the grounds for dismissal.

B. Statement of Facts

As indicated in his own pleadings filed in the actions, Petitioner is an Ohio resident and ACI-Delaware is a Delaware corporation with its principal place of business located in Ohio. The named defendants in each action were respondents O'Neill and Vorys, Graham, Isaac and Judge Kinneary. As indicated in their dismissal motions, respondent O'Neill is an Ohio resident and respondent Vorys has its principal place of business in Columbus, Ohio.

In the derivative action, (C-2-86-1201), Petitioner alleged four counts against the named defendants in various combinations. Count I generally alleged malpractice claims against O'Neill and Vorys in representing Petitioner and ACI-Delaware in a prior lawsuit (Case No. C-2-84-1979) which was still pending before Judge Kinneary in January 1987. Count II averred prejudice by Judge Kinneary in ruling against Petitioner and ACI-Delaware in two preliminary injunction hearings conducted in the pending action (Case No. C-2-84-1979), and further alleged that Judge Kinneary subverted and denied Petitioner's and ACI-Delaware's federal constitutional rights in that action. Count III was brought against Graham and Isaac and alleged that Graham, in acting as opposing counsel in the pending case (Case No. C-2-84-1979), exerted "improper influence" upon Judge Kinneary which contributed further to the alleged prejudice of Judge Kinneary against Petitioner and ACI-Delaware. Count V named all of the above defendants and claimed that a "synergistic phenomena" developed through the alleged incompetence of O'Neill and Vorys, alleged prejudice of Judge Kinneary, and the alleged improper influence by Graham and Isaac, all of

which allegedly contributed to an unfavorable determination of the rights of both Petitioner and ACI-Delaware in the proceedings before Judge Kinneary.

In the second action (C-2-86-1309), brought by Petitioner in his individual capacity, Petitioner alleged the very same counts against the above-named defendants except that each count was modified to reflect an individual claim rather than one belonging to ACI-Delaware. In both actions, Petitioner asserted federal question jurisdiction pursuant to 28 U.S.C. §1331 with respect to all counts against Judge Kinneary. No basis for federal jurisdiction was ever pled with respect to O'Neill and Vorys.

The underlying allegations found in the various counts of these actions stem in part from a previous lawsuit[2] which was commenced on behalf of Petitioner in the District Court on November 15, 1984. O'Neill and Vorys represented Petitioner in that action which sought to enjoin the defendant, Omnimax, Inc. ("Omnimax"), from exercising shareholder rights with respect to shares of ACI-Delaware, and from breaching a certain voting trust agreement pertaining to the disputed shares. Graham and Isaac defended Omnimax in the litigation.

In the *Applied Coatings* action, Petitioner claimed that Omnimax had failed to raise sufficient start-up capital for the formation of an Ohio corporation, ACI-Ohio, in breach of a joint venture agreement previously executed between Petitioner and Omnimax. The joint venture agreement had specified that in return for providing start-up capital, Omnimax would receive a forty-nine percent (49%) ownership in the newly formed corporation. After a

---

[2]*Applied Coatings International, Inc., et al. v. Omnimax, et al.*, Civil Action No. C-2-84-1979, Southern District of Ohio, Eastern Division (hereinafter *"Applied Coatings"*).

merger between ACI-Ohio and Red Cliff Energy, Inc. to form ACI-Delaware, the dispute over shareholder rights centered around the ownership in ACI-Delaware, with ACI-Ohio eventually becoming a wholly-owned subsidiary of ACI-Delaware.

On February 12, 1985, Judge Kinneary denied the preliminary injunction sought by Petitioner. Petitioner alleged that O'Neill failed to object to allegedly perjurious testimony[3] during the preliminary injunction hearing and that Judge Kinneary's ruling was based upon prejudice against Petitioner and ACI-Delaware. Furthermore, Petitioner alleged that Graham, in representing Omnimax, exerted improper influence upon Judge Kinneary.

The remaining allegations asserted by Petitioner in these *pro se* actions relate to a preliminary injunction motion brought by Omnimax against Petitioner and ACI-Delaware on May 17, 1985. By that motion, Omnimax sought to enjoin implementation of certain corporate resolutions of the ACI-Delaware board of directors, including but not limited to, the issuance of new shares which allegedly interfered with a proxy solicitation by Omnimax.

On October 1, 1985, Judge Kinneary granted a preliminary injunction in favor of Omnimax. Again, Petitioner alleged that O'Neill and Vorys' incompetence, Judge Kinneary's judicial misconduct and Graham and Isaac's improper influence all tainted the evidentiary hearing upon which the preliminary injunction was granted. This case continued before Judge Kinneary and was tried to a jury in the fall of 1987.

---

[3]As set forth in various pleadings filed by petitioner in the District Court and Court of Appeals, the claim of perjurious testimony is anti-Semetic and is based solely upon the fact that testimony was given by jews.

On the pending appeal, the District Court dismissed the derivative action as to Judge Kinneary on January 16, 1987, citing the doctrine of judicial immunity. Thereafter, on February 13, 1987, the Court dismissed the entire action indicating in its Memorandum and Order that Petitioner had failed to establish subject matter jurisdiction as to the malpractice claims asserted against O'Neill and Vorys and as to the claims asserted against Graham and Isaac. The Court further noted that, as an alternative ground for dismissal, Petitioner's claims were an impermissible collateral attack upon the decisions rendered by Judge Kinneary in the *Applied Coatings* action. The Court then declined to exercise pendent jurisdiction over these claims.

As to the individual action, The District Court dismissed the entire action on January 26, 1987, again citing the doctrine of judicial immunity as to Judge Kinneary, and the lack of federal jurisdiction over the state law claims asserted against the remaining defendants.

On February 23, 1987, Petitioner filed notices of appeal with the Sixth Circuit contesting these dismissals. Thereafter, the appeals were consolidated by Order of the Sixth Circuit on March 27, 1987. Finally, on August 17, 1987, the Sixth Circuit denied the consolidated appeals and affirmed the judgments of the District Court dismissing the actions for lack of federal subject matter jurisdiction.

In its Order affirming the District Court's dismissals, the Sixth Circuit found that the District Court had properly dismissed the actions for the lack of diversity of citizenship between the parties and the absence of federal claims not barred by judicial immunity. The Sixth Circuit also noted that, in substance, the actions amounted to

nothing more than an improper attempt by Petitioner to collaterally attack the aforementioned preliminary injunction orders issued by Judge Kinneary in the *Applied Coatings* action (Case No. C-2-84-1979).

III. SUMMARY OF ARGUMENT

Petitioner has failed to present any credible reason why this Court should grant certiorari to review the Sixth Circuit's affirmance of the District Court dismissal of the two *pro se* actions. The simple and uncontroverted jurisdictional facts involved in these appeals are well documented in the record. Moreover, as indicated in its Order denying the appeals, the Sixth Circuit based its decision upon the most simple and straight forward applications of elementary principles of federal jurisdiction.

Petitioner, ACI-Delaware, O'Neill and Vorys are all Ohio citizens for purposes of determining diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332. Petitioner's only arguable federal claims were asserted against Judge Kinneary and were barred by the complete defense of judicial immunity. For these reasons, the Sixth Circuit affirmed the District Court's dismissals for lack of federal subject matter jurisdiction.

In his Petition for Certiorari, Petitioner has failed to articulate any of the grounds enumerated under Supreme Court Rule 17, or for that matter, any other conceivable grounds that would compel this Court to review the Sixth Circuit's denial of these appeals. A review of these frivolous appeals is, by definition, neither necessary to maintain uniformity of decisions among the federal courts of appeals, nor required to decide an important federal question.

Accordingly, the Court should deny this Petition for Certiorari.

IV. ARGUMENT

The Sixth Circuit properly denied Petitioner's appeals and affirmed the judgments of the District Court dismissing the actions for the obvious lack of subject matter jurisdiction. Petitioner has repeatedly demonstrated in both his pleadings filed in the District Court actions and his briefs submitted to the Sixth Circuit, that no diversity of citizenship existed between Petitioner and respondents O'Neill and Vorys. Petitioner is an Ohio resident and ACI-Delaware has its principal place of business in Ohio. Accordingly, Petitioner and ACI-Delaware are citizens of Ohio for purposes of determining diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332.

Similarly, O'Neill and Vorys are Ohio citizens for purposes of determining diversity jurisdiction. O'Neill is a resident of Ohio, Vorys has its principal place of business in Ohio and each of the Vorys' partners at this location, including O'Neill, are members of the Bar of the State of Ohio and residents of the State of Ohio. Thus, Petitioner cannot assert that the Sixth Circuit committed an error in affirming the District Court's dismissals on the jurisdictional basis of diversity of citizenship. 28 U.S.C. §1332.

As to the substance of the claims asserted against O'Neill and Vorys, the Sixth Circuit correctly found that Petitioner's claims were for legal malpractice allegedly committed by respondents in their prior representation of Petitioner in the *Applied Coatings* action.[4] The Court ruled that these malpractice claims purely involved matters of

[4]Indeed in his pleadings, Petitioner, himself, conceded that the claims against O'Neill and Vorys were for simple malpractice.

state law and, as such, could in no way provide Petitioner with an independent basis for invoking federal jurisdiction against respondents O'Neill and Vorys. *See Lones v. Detroit, T. & I.R. Co.,* 398 F.2d 914 (6th Cir. 1968) (in affirming entry of jury verdict, court applied Ohio law of negligence), *cert. den.,* 313 U.S. 1063 (1969). Without the presence of a federal claim against O'Neill and Vorys, the Sixth Circuit property concluded that the District Court had no independent basis for asserting federal jurisdiction over the entire claims brought against O'Neill and Vorys.

The Sixth Circuit also affirmed the District Court's refusal to exercise pendent jurisdiction over the state law claims asserted against O'Neill and Vorys. The only basis for subject matter jurisdiction asserted by Petitioner pertained to the claims brought against Judge Kinneary. These claims were dismissed by the District Court on the ground that they failed to state a cause of action upon which relief could be granted, since they were barred by the complete defense of judicial immunity. This finding was affirmed by the Sixth Circuit, citing *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, (1978), and ruling that Judge Kinneary was "cloaked with judicial immunity".

As a result, the Sixth Circuit left undisturbed the District Court's decision to refrain from exercising pendent jurisdiction over the remaining state law claims against respondents O'Neill and Vorys on the ground that the absence of a substantial federal claim necessitated a dismissal of the remaining state claims. In doing so, the Sixth Circuit reaffirmed legal principles well supported by the great weight of authority. *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, (1966); *Gibson v. First Federal Savings and Loan Association,* 504 F.2d 826 (6th Cir. 1974); *Kurz v. Michigan,* 548 F.2d 172 (6th Cir. 1977), *cert.*

den., 434 U.S. 972 (1977), *reh. den.*, 434 U.S. 1089 (1980); *Province v. Cleveland Press Publishing Co.*, 787 F.2d 1047 (6th Cir. 1986); *Service, Hospital, Nursing Home and Public Employees Union v. Commercial Property Services*, 755 F.2d 499 (6th Cir. 1985), *cert. den.*, 474 U.S. 850 (1985).

Thus, the Sixth Circuit correctly affirmed the District Court's refusal to exercise pendent jurisdiction over the state law claims brought against respondents O'Neill and Vorys.[5] In addition, it is also well settled that a federal court can only assert pendent jurisdiction over related *claims* between the same parties to the original federal claim. There is no basis for the exercise of federal jurisdiction over other parties who are not defendants in the federal claims asserted. *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413 (1976) (affirming dismissal of state law claims against defendants with respect to whom no federal claim was asserted). Because no claim under §1331 is alleged against O'Neill and Vorys and because pendent party jurisdiction does not exist, there remains no conceivable basis on which the Sixth Circuit could have erred in affirming the District Court's exercise of discretion in declining to exercise pendent jurisdiction over the malpractice claims against O'Neill and Vorys.

In light of the foregoing, and in view of the considerations found in Supreme Court Rule 17 governing review on certiorari, it is abundantly clear that this Court's review of the Sixth Circuit's denial of these patently frivolous

---

[5]As asserted by O'Neill and Vorys in their brief filed with the Sixth Circuit, in the event that this Court should find that the Sixth Circuit erred in affirming the District Court's dismissal of the federal claims asserted against Judge Kinneary, and thereby conclude that subject matter jurisdiction was present as to those federal claims, there is still no basis for asserting jurisdiction over the state claims brought against O'Neill and Vorys.

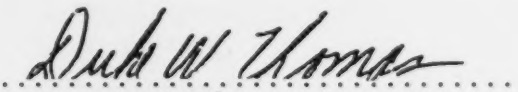
appeals is not merited. The denial of these frivolous appeals does not leave unresolved a conflict of decisions among the federal courts of appeals nor an important question of federal law.

Petitioner has failed to present any reason—compelling or otherwise—why this Court should grant certiorari. Petitioner has also neglected to comply with the form and content requirements for filing a Petition for Certiorari, listed under Supreme Court Rule 21. The Petition for Certiorari does not contain a clear, accurate or brief statement of the case, nor does it even attempt to summarize the proceedings below and the grounds upon which Petitioner is asking this Court to grant certiorari. For the most part, the Petition does not, in any meaningful way, address the issue of whether the denial of these appeals merits a review by this Court. For all of these reasons, this Court should deny the Petition for Certiorari.

V. CONCLUSION

The record of the proceedings below conclusively demonstrates the lack of federal jurisdiction over the claims asserted against respondents O'Neill and Vorys. No diversity of citizenship exists between Petitioner and O'Neill and Vorys, and only state law malpractice claims are alleged. Accordingly, a review of the Sixth Circuit's denial of these appeals for lack of subject matter jurisdiction is not warranted by this Court. For all of the foregoing reasons, this Court should deny the Petition for Certiorari.

Respectfully submitted,



DUKE W. THOMAS
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
Post Office Box 1008
Columbus, Ohio 43216-1008
(614) 464-6263

Attorneys for Respondent,
C. WILLIAM O'NEILL AND
VORYS, SATER, SEYMOUR AND PEASE

Of Counsel:

SUZANNE K. RICHARDS
ROBERT S. GEBHARD
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
Post Office Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Respondents C. William O'Neill and Vorys, Sater, Seymour and Pease in Opposition to the Petition for Certiorari has been served upon the following parties and counsel by U.S. Mail, postage prepaid, this 1st day of February, 1988.

Harry A. Beale
775 Kaderly Drive
Columbus, OH 43228

John Alton, Esq.
Lane, Alton & Horst
155 East Broad Street
Columbus, OH 43215

Counsel for Richard C. Graham
and Isaac, Brant, Ledman & Becker

James E. Rattan, Esq.
85 Marconi Boulevard
Columbus, OH 43215

Counsel for the Honorable
Joseph P. Kinneary

Duke W. Thomas

Duke W. Thomas

[This Page Intentionally Left Blank]

[This Page Intentionally Left Blank]

(4)

Supreme Court, U.S.
FILED
FEB 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1172

IN THE
SUPREME COURT OF THE UNITED STATES
October 1987 Term

HARRY BEALE,

vs.

C. WILLIAM O'NEILL, et al.,

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS RICHARD C. GRAHAM AND ISAAC, BRANT, LEDMAN & BECKER'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Robert D. Erney
LANE, ALTON & HORST
175 South Third Street
Columbus, Ohio 43215
614/228-6885

Attorneys for Respondents,
Richard C. Graham and Isaac,
Brant, Ledman & Becker

Of Counsel:
John M. Alton
LANE, ALTON & HORST
175 South Third Street
Columbus, Ohio 43215
614/228-6885

TABLE OF CONTENTS

Page

Question Presented For Review 1

Parties To the Proceeding 1

Opinions and Judgments Delivered In the Courts Below. 1

Jurisdiction. 2

Applicable Statutes 3

Statement Of the Case 4

A. Proceedings Below. 4

B. Statement Of Facts 7

Summary Of the Argument 13

Argument and Law. 15

I. The Court Of Appeals Properly Affirmed the Judgments Of the District Courts Which Held That Petitioner Had Failed To Establish Subject Matter Jurisdiction and That Respondents Graham and Isaac Were Entitled To Have the Claims Against Them Dismissed 15

II. The Court Of Appeals Properly Affirmed the Judgments Of the District Courts Which Held That the State Law Claims For Malpractice/Conspiracy Provided No Independent

Basis For Invoking Federal Jurisdiction. 19

III. The Court of Appeals For the Sixth Circuit Properly Affirmed the Judgments Of the District Courts Which Declined To Exercise Pendent Jurisdiction Over the State Law Claims Against Respondents Graham and Isaac. 22

Conclusion. 23

Certificate of Service. 26

TABLE OF AUTHORITIES

Page

Cases

Applied Coatings International, Inc., et al. v. Omnimax, et al., Civil Action No. C-2-84-1979, Southern District of Ohio, Eastern Division 7,13

Belfer v. Spiegel, (1984), 18 Ohio App. 3d 64, 480 N.E. 2d 825 20

Gibson v. First Federal Savings & Loan Assoc., 504 F. 2d 826 (6th Cir. 1974). . 23

Kasper v. National Electric Products Corp., 165 F. 2d 434 (3d Cir. 1948) . . 16

Kurz v. Michigan, 548 F. 2d 172 (6th Cir. 1977). . 23

Lones v. Detroit, T. & I.R. Co., 398 F. 2d 914 (6th Cir. 1968), cert. den. 313 U.S. 1063 (1969). 20

Pierson v. Ray, 386 U.S. 547, 545 (1967) 17

Province v. Cleveland Press Publishing Co., 787 F. 2d 1047, 1055 (6th Cir. 1986). 22

Purcell v. Summers, 126 F. 2d 390 (4th Cir. 1942), cert. den. 317 U.S. 640 (1942) 16

Smith v. Rose,
760 F. 2d 102 (6th Cir. 1985). . 21

Stump v. Sparkman,
435 U.S. 355 (1978). 17

United Mine Workers v. Gibbs,
383 U.S. 715, 726 (1966) 22

Statutes and Rules

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1331. . . . . 3, 11, 22

28 U.S.C. Section 1332. . . . . 3, 18

28 U.S.C. Section 1441. 4

28 U.S.C. Section 1603(a) 4

QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court should grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit which affirmed the dismissals of petitioner's state-law malpractice/conspiracy claims against respondents, Richard C. Graham and Isaac, Brant, Ledman & Becker, for lack of subject matter jurisdiction?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Petitioner, Harry Beale (Beale).

Respondents, Richard C. Graham (Graham) and Isaac, Brant, Ledman & Becker (Isaac).

Respondent, The Honorable United States District Court Judge Joseph P. Kinneary.

Respondents, C. William O'Neill (O'Neill) and Vorys, Sater, Seymour & Pease (Vorys).

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Petitioner has included in his

appendix the decisions of the United States District Court for the Southern District of Ohio, Eastern Division, which dismissed petitioner's claims for lack of subject matter jurisdiction. The unreported opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the dismissals in the consolidated appeal, is also included in the petitioner's appendix. Finally, the United States Court of Appeals for the Sixth Circuit's denial of the petition for rehearing en banc is also included in the appendix.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1) which provides for the review of decisions by the United States Courts of Appeals by writ of certiorari granted upon the petition of any party to any civil case. The judgment of the Court of

Appeals was entered on October 16, 1987. The petition for a writ of certiorari was filed on January 4, 1988.

APPLICABLE STATUTES

This case involves the two most common federal jurisdictional statutes. "Federal question" jurisdiction is provided for in 28 U.S.C. Section 1331, which provides, as follows:

> The district courts shall have original jurisdictional of all civil actions arising under the constitution, laws, or treaties of the United States.

The "diversity of citizenship" statute, codified in 28 U.S.C. 1332, provides, in pertinent part, as follows:

> (a) the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between-
>
> (1) citizens of different states;
>
> (2) citizens of the state and citizens or subjects of a foreign state;

(3) citizens of different states and in which citizens are subjects of a foreign state are additional parties; and

(4) a foreign state, defined in Section 1603(a) of this title, as plaintiff and citizens of a state or of different states.

* * *

(c) for the purpose of this section and section 1441 of this title, the corporation shall be deemed a citizen of any state by which is has been incorporated and of the state where it has its principal place of business * * *.

STATEMENT OF THE CASE

A. Proceedings Below

This appeal arose out of two pro se actions instituted by petitioner against respondents O'Neill, Vorys, Judge Kinneary, Graham, and Isaac. The actions were commenced on October 7, 1986 (Case No. C-2-86-1201) and October 20, 1986 (Case No. C-2-86-1309) and were filed in the United States District Court for the

Southern District of Ohio, Eastern Division.

The two actions were identical in terms of the named defendants and counts alleged, except that petitioner attempted to bring the first action as a derivative suit on behalf of Applied Coatings International of Delaware (ACI, Delaware) and the second action as an individual claim. The counts against attorney Graham and Isaac in both cases alleged amorphous claims, sounding in conspiracy or legal malpractice, originating from Graham's representation of Omnimax, Inc. in a prior lawsuit. Specificially, petitioner alleged that Graham and Isaac exerted "improper influence upon Judge Kinneary which contributed to the alleged prejudice of Judge Kinneary against Beale and ACI, Delaware."

The United States Attorney, representing Judge Kinneary, filed

motions to dismiss in both actions on the ground of judicial immunity. O'Neill and Vorys filed motions to dismiss, premised upon several grounds, including the lack of subject matter jurisdiction. On February 6, 1987, the district court dismissed Case No. C-2-86-1201. On February 13, 1987, the district court dismissed Case No. C-2-86-1309. Both actions were dismissed in their entirety for lack of federal subject matter jurisdiction. In both cases, the court declined to exercise its power of pendent jurisdiction over petitioner's state claims for malpractice and conspiracy.

On February 13, 1987 and February 23, 1987, petitioner perfected appeals of both dismissals in the United States Court of Appeals for the Sixth Circuit. Upon motion, the separate appeals were consolidated under Case Nos. 87-3142 and 87-3170. On August 14, 1987, the Court

of Appeals affirmed the judgments of the district court. Petitioner's petition for a rehearing en banc was overruled on October 16, 1987.

B. Statement of Facts

Petitioner is an Ohio resident. See complaints and amended complaints, paragraph one.[1] ACI, Delaware, is organized under the laws of Delaware with its principal place of business in Ohio. See complaint, paragraph one, amended complaints, paragraph one. Respondent Graham is an Ohio resident and his law firm, Isaac, has its principal place of business in Ohio.

Petitioner's allegations in his complaints stemmed from respondents Graham and Isaac's involvement in a previous civil action, viz., Applied Coatings International, Inc., et al. v.

---

[1] References to petitioner's complaints and amended complaints apply to both pro se actions.

Omnimax, et al., Civil Action No. C-2-84-1979, Southern District of Ohio, Eastern Division. In that action, filed on December 7, 1984, petitioner was represented by attorneys O'Neill and Vorys. Respondent Graham represented one of the defendants, Omnimax, Inc. In that case, petitioner sought to enjoin Omnimax, Inc. (Omnimax) from exercising shareholder rights with respect to shares of Applied Coatings International, Delaware, and from breaching a voting trust agreement pertaining to those disputed shares.

Furthermore, in the Applied Coatings action, petitioner claimed that Omnimax had failed to raise sufficient start-up capital for the formation of an Ohio corporation, ACI-Ohio, in breach of a joint venture agreement previously executed between petitioner and Omnimax. The joint venture agreement had specified

that in return for providing start-up capital, Omnimax would receive forty-nine percent ownership in the newly-formed corporation. After a merger between ACI-Ohio and Red Cliff Energy, Inc. to form ACI, Delaware, the dispute over shareholder rights centered around ownership in ACI-Delaware, with ACI-Ohio eventually becoming a wholly-owned subsidiary of ACI-Delaware. On February 12, 1985, Judge Kinneary, who presided over that particular case, denied the preliminary injunctions sought by petitioner.

On May 17, 1985, Omnimax instituted a motion for a preliminary injunction against petitioner and ACI-Delaware. In that motion, Omnimax sought to enjoin the implementation of certain corporate resolutions of the ACI-Delaware board of directors, including, but not limited to, the issuance of new shares which

allegedly interfered with the proxy solicitation by Omnimax. On October 1, 1985, Judge Kinneary granted the preliminary injunction in favor of Omnimax.[2]

Thereafter, petitioner instituted the instant pro se actions. In Count one of both actions, petitioner alleged legal malpractice on the part of O'Neill and Vorys. In Count two, petitioner alleged that Judge Kinneary had conspired with respondent Graham to attempt to force ACI-Ohio into bankruptcy. In Count three, petitioner maintained that respondent Graham had exerted improper influence over Judge Kinneary and that

---

[2] The actual trial in case number C-2-84-1979 occurred in late August, 1987. The jury found that petitioner had committed fraud and breach of fiduciary duty. The district court entered judgment against petitioner in the amount of $164,100. Petitioner has appealed that judgment and the matter is now pending in the Sixth Circuit Court of Appeals in App. No. 87-3987.

Isaac was aware of Graham's actions. Petitioner insinuated that such "improper influence" was exerted because respondent Graham was Judge Kinneary's former judicial clerk.

Petitioner's entire claim was based upon an allegation by Donald S. Moore, an employee of petitioner, who stated in an affidavit that he saw one of Judge Kinneary's law clerks "motion and mouth something to Mr. Richard C. Graham * * *." In addition, petitioner relied upon the same affidavit where Mr. Moore stated that "Mr. Graham did write something and hand it to Mr. Oliver who was asking questions of Dr. Beale." In Count four, petitioner alleged that a "synergestic phenomena" had developed through the improper action of the defendants.

In each action, the complaint and amended complaint plead federal question jurisdiction, pursuant to 28 U.S.C.

Section 1331, with respect to all counts brought against respondent Judge Kinneary. However, with respect to respondents Graham and Isaac, no basis for federal jurisdiction was alleged. Although he was given the opportunity to do so, petitioner never alleged that the conduct of respondents Graham and Isaac raised a federal question.

In both actions, the district courts construed only petitioner's actions against respondent Judge Kinneary as those which presented federal questions. However, the district courts dismissed those claims based upon the doctrine of judicial immunity. Thereafter, the courts, in both cases, determined that the remaining claims were state claims which had no independent basis for invoking federal jurisdiction. The courts declined to exercise pendent jurisdiction over the remaining state law

claims against respondents, due to the absence of a remaining substantial federal claim. Finally, the courts noted that petitioner's claims amounted to impermissible collateral attacks upon decisions rendered by Judge Kinneary in the prior case pending before him, viz., Applied Coatings International, et al. v. Omnimax, et al., Civ. Action No. C-2-84-1979.

SUMMARY OF THE ARGUMENT

The district court properly dismissed both actions against respondents Graham and Isaac for lack of subject matter jurisdiction. The only arguable claims arising under the constitution or laws of the United States were the complaints against respondent Judge Kinneary. However, the district court properly dismissed those claims due to the doctrine of judicial immunity. The remaining claims of either conspiracy

or malpractice against respondents Graham and Isaac provided no independent basis for invoking federal jurisdiction. Thus, the district court properly declined to exercise pendent jurisdiction over those state claims.

Under these circumstances, the Court of Appeals for the Sixth Circuit properly affirmed the judgments of the district court. The appellate court's decision is not in conflict with the decision of another federal court of appeals on the same matter. The appellate court did not decide a federal question in a conflicting manner with a state court of last resort. The federal court of appeals did not decide an important question of federal law which has not been settled by this court. There is no conflict with the decisions of this court. Moreover, this appeal involves no constitutional question.

Consequently, respondents respectfully request that the petition for certiorari be denied.

ARGUMENT AND LAW

I. The Court of Appeals Properly Affirmed the Judgments of the District Courts Which Held That Petitioner Had Failed to Establish Subject Matter Jurisdiction and That Respondents Graham and Isaac Were Entitled to Have the Claims Against Them Dismissed.

The dismissals of petitioner's actions were premised upon three conclusions:

(1) The doctrine of judicial immunity barred the claims asserted against Judge Kinneary;

(2) The claims for malpractice/conspiracy against respondents Graham and Isaac provided no independent basis for invoking federal jurisdiction;

(3) Upon dismissal of the federal claims against Judge Kinneary, the exercise of pendent jurisdiction as to the remaining state law claims was unwarranted.

The only issue before the Court of Appeals for the Sixth Circuit was whether the district court erred in dismissing

the actions. Purcell v. Summers, 126 F. 2d 390 (4th Cir. 1942)(after reversing trial court's dismissal premised upon lack of jurisdiction, reviewing court would not pass on whether plaintiffs had stated a cause of action), cert. den. 317 U.S. 640 (1942); Kasper v. National Electric Products Corp., 165 F. 2d 434 (3d Cir. 1948)(in affirming district court's dismissal of an action for lack of subject matter jurisdiction, appellate court would not consider the question of whether plaintiffs had stated a cause of action).

The Court of Appeals for the Sixth Circuit properly affirmed the dismissals of respondent, Judge Kinneary. It is established law that judges are absolutely immune from suit for actions taken in their judicial capacity unless they are performed in the clear absence of all jurisdiction. Stump v. Sparkman,

435 U.S. 355 (1978). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" Id. at 356-357. The rationale for judicial immunity was set forth in Pierson v. Ray, 386 U.S. 547, 545 (1967):

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His error may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Consequently, the Court of Appeals for the Sixth Circuit properly affirmed the judgments of the district courts

which dismissed the claims against respondent Judge Kinneary. However, the claims against Judge Kinneary were the only ones which arguably raised a federal question. The remaining state law claims against respondents failed to raise a federal question. Thus, the claims against respondents Graham and Isaac were properly subject to dismissal.

II. The Court of Appeals Properly Affirmed the Judgments of the District Courts Which Held That the State Law Claims for Malpractice/Conspiracy Provided No Independent Basis for Invoking Federal Jurisdiction.

Petitioner's pro se actions were properly dismissed for lack of subject matter jurisdiction. The pleadings clearly indicated that no diversity of citizenship existed between petitioner and respondents, Graham and Isaac. Petitioner and ACI, Delaware are citizens of Ohio for purposes of determining diversity jurisdiction pursuant to 28

U.S.C. §1332. As evidenced in the complaint and amended complaint, petitioner is an Ohio resident and ACI, Delaware has its principal place of business in Ohio. Likewise, respondents Graham and Isaac are Ohio citizens for purposes of determining diversity jurisdiction, since Graham is a resident of Ohio and Isaac has its principal place of business in Ohio. Thus, it is clear that the district courts could not retain subject matter jurisdiction over petitioner's actions on the basis of diversity of citizenship.

Furthermore, the district courts properly ruled that petitioner's claims against respondents, Graham and Isaac, were state law claims of malpractice/ conspiracy, and as such, provided no independent basis for invoking federal jurisdiction. There can be no dispute that a cause of action for legal

malpractice, like any other negligence action, is a matter of state law. See Lones v. Detroit, T. & I.R. Co., 398 F. 2d 914 (6th Cir. 1968), cert. den. 313 U.S. 1063 (1969). Furthermore, this allegation failed to state a claim upon which relief could be granted since respondents Graham and Isaac had never entered into an attorney - client relationship with petitioner. According to Ohio law, in order to prevail in a legal malpractice claim, it must be established, among other things, that there was an attorney-client relationship between the parties. Belfer v. Spiegel (1984), 18 Ohio App. 3d 64, 480 N.E. 2d 825.

With respect to the amorphous conspiracy claim, petitioner failed to allege that the conduct of respondents raised a federal question. Petitioner did not allege that this conspiracy

violated his federal constitutional rights. Petitioner's allegations were amorphous, conclusory and uncertain. Mere conclusory allegations are not sufficient to state a claim for damages based on an alleged conspiracy. Smith v. Rose, 760 F. 2d 102 (6th Cir. 1985).

Succinctly stated, no federal claims were ever alleged against respondents, Graham and Isaac. It should be noted that petitioner did refile his state claims of conspiracy and malpractice against respondents, Graham and Isaac, in state court in Ohio. Under these circumstances, the Court of Appeals for the Sixth Circuit properly affirmed the judgments of the district courts which found that the amorphous state law claims of malpractice/conspiracy, brought against respondents Graham and Isaac, had no independent basis for subject matter jurisdiction, pursuant to 28 U.S.C.

§1331.

III. The Court of Appeals for the Sixth Circuit Properly Affirmed the Judgments of the District Courts Which Declined To Exercise Pendent Jurisdiction Over the State Law Claims Against Respondents Graham and Isaac.

"It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). The Sixth Circuit has adopted the position that "district courts have minimal discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial." Province v. Cleveland Press Publishing Co., 787 F. 2d 1047, 1055 (6th Cir. 1986). However, in the absence of a substantial federal claim related to the asserted state claims, federal courts properly decline to exercise pendent jurisdiction over the "pure" state claims. Gibson v. First

Federal Savings & Loan Assoc., 504 F. 2d 826 (6th Cir. 1974). A dismissal of all federal claims before trial requires dismissal of the state claims as well. Kurz v. Michigan, 548 F. 2d 172 (6th Cir. 1977).

Applying these guiding principles to the facts of the instant case, it cannot be said that the district courts abused their discretion in declining to assert pendent jurisdiction over the purely state law claims brought against respondents, Graham and Isaac. Under these circumstances, the Court of Appeals for the Sixth Circuit properly affirmed the judgments of the district courts. Without the existence of a substantial federal claim, the district courts simply did not have jurisdiction to entertain petitioner's claims.

CONCLUSION

The Court of Appeals for the Sixth

Circuit did not decide a federal question in a conflicting manner with a state court of last resort. The Sixth Circuit Court of Appeals did not decide an important question of federal law which has not been settled by this court. This case raises no conflicts with the prior decisions of this court. Moreover, this petition for certiorari involves no constitutional questions.

The district courts properly dismissed both actions against respondents Graham and Isaac for lack of subject matter jurisdiction. The state law claims for malpractice/conspiracy provided no independent basis for invoking federal subject-matter jurisdiction. The district courts properly declined to exercise their power of pendent jurisdiction over those state claims. Under these circumstances, the Court of Appeals for the Sixth Circuit

properly affirmed the judgments of the district courts.

For all of these reasons, respondents Graham and Isaac respectfully request that this court deny the petition for certiorari.

Respectfully submitted,

By Robert D. Erney
Robert D. Erney (ERN02)
LANE, ALTON & HORST
175 South Third Street
Columbus, Ohio 43215
614/228-6885

Attorneys for Respondents
Richard C. Graham and
Isaac, Brant, Ledman &
Becker

Of Counsel:

John M. Alton
LANE, ALTON & HORST
175 South Third Street
Columbus, Ohio 43215
614/228-6885

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon Harry A. Beale, Pro Se, 775 Kaderly Drive, Columbus, Ohio 43228, Duke W. Thomas and Suzanne K. Richards, Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio 43216, James E. Rattan, 85 Marconi Boulevard, Columbus, Ohio 43215 and the Solicitor General, Department of Justice, Washington, D.C. 20530, by ordinary U.S. Mail, postage prepaid this 4 day of February, 1988.

Robert D. Erney

Robert D. Erney